(1)

Supreme Court, U.S.
FILED

94 242 AUG - 9 1994

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS H. EGAN,
Petitioner,

VS.

WELLS FARGO ALARM SERVICES,
also known as BAKER PROTECTIVE SERVICES, INC.,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

CLYDE E. CRAIG
(Counsel of Record for Petitioner)
9020 Manchester Road
St. Louis, Missouri 63144
(314) 961-5100

Of Counsel:
CRAIG & NANGLE, P.C.

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

92 pp

QUESTION PRESENTED FOR REVIEW

Is Petitioner precluded from pursuing his state-law wrongful discharge claim because he was employed under a collective bargaining agreement, even though his wrongful discharge claim is independent of the collective bargaining agreement and does not require a construction of the collective bargaining agreement?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	v
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	8
CERTIFICATE OF SERVICE	10
APPENDIX	A-1

TABLE OF AUTHORITIES

Page(s)

CASES:

Amaan v. City of Eureka, 615 S.W.2d 414 (Mo. banc 1981) 5

Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo.App. 1985) 5

Crockett v. Mid-America Health Services, 780 S.W.2d 656 (Mo.App. 1989) 6

Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273 (Mo. banc 1984) 5

Hawaiian Airlines, Inc. v. Norris, 114 S.Ct. 223 (1994) 4,8

Komm v. McFlicker, 662 F.Supp. 924 (W.D.Mo. 1987) 6

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) 6,7,8

Livadas v. Bradshaw, 114 S.Ct. 2068 (1994) 7,8

Luethans v. Washington University, 838 S.W.2d 117 (Mo. App. 1992) 5

McCloskey v. Eagleton, 789 S.W.2d 518 (Mo.App. 1990) 5

Norris v. Finazzo, 74 Haw. 235, 842 P.2d 634 (1992) 4

Norris v. Hawaiian Airlines, Inc., 74 Haw. 648, 847 P.2d 634 (1993) 4

Petersimes v. Crane Co., 835 S.W.2d 514 (Mo.App. 1992) 5,6

Smith v. Arthur C. Baue Funeral Home, 370 S.W.2d 249 (Mo. 1963) 5

Steelworkers v. Rawson, 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990) 6

Wolfe v. Central Mine Equipment Co., 850 F.2d 469 (8th Cir. 1988) 6

STATUTES:

28 U.S.C. Sec. 1254(1) 2

28 U.S.C. Sec. 1291 2

28 U.S.C. Sec. 1294(1) 2

28 U.S.C. Sec. 1332(a)(1) 2

41 U.S.C. Secs. 701 et seq. 2,5

Haw. Rev. Stat. Secs. 378-61 to 378-69 4

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS H. EGAN,
Petitioner,

VS.

WELLS FARGO ALARM SERVICES,
also known as BAKER PROTECTIVE SERVICES, INC.,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

On May 11, 1994, the United States Court of Appeals for the Eighth Circuit issued its decision affirming the District Court's order issued on July 8, 1993 granting summary judgment in favor of the Respondent on the ground that Petitioner was precluded from pursuing his wrongful discharge claim based upon Missouri state law because he was employed pursuant to a collective bargaining agreement, even though his wrongful discharge claim was independent of the collective bargaining agreement and did not require a construction of the collective bargaining agreement. 23 F.3d 1444. The District Court had jurisdiction

after removal from the state court on the basis of diversity of citizenship. 28 U.S.C. § 1332(a)(1). The United States Court of Appeals for the Eighth Circuit had jurisdiction of the appeal pursuant to 28 U.S.C. §§ 1291 and 1294(1). This Court has jurisdiction over the Petition for a Writ of Certiorari pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

This case for wrongful discharge was originally filed by Petitioner Thomas H. Egan in the Circuit Court of the City of St. Louis on August 22, 1991, and was removed by Respondent to the United States District Court for the Eastern District of Missouri on November 9, 1992 on the basis of diversity of citizenship. 28 U.S.C. § 1332(a)(1). At the time of the District Court's decision, Petitioner's wrongful discharge claim was pending on Count II of his First Amended Complaint predicated on the "whistleblower" exception to Missouri's employment at will doctrine.

Petitioner was initially employed by Respondent as an alarm technician on July 3, 1974, and he was terminated following a medical leave on July 1, 1991. His performance as an employee was not a factor in his termination. During the term of his employment, Petitioner was covered by a collective bargaining agreement between Respondent and Local 1 of the International Brotherhood of Electrical Workers.

Petitioner's wrongful discharge claim was based upon his contention that he was discharged because he reported to Respondent, a government contractor, about non-compliance with the Drug Free Workplace Act of 1988, 41 U.S.C. §§ 701 et seq., and Respondent ignored those reports and retaliated against him for making them. Petitioner later reported these matters to the FBI as well.

In an unreported decision issued on July 8, 1993, the District Court granted summary judgment in favor of Respondent on the basis that the "whistleblower" exception to Missouri's employment at will doctrine is not available to Petitioner because he was a contract employee and not an at will employee during the term of his employment, even though Petitioner's wrongful discharge claim was independent of the collective bargaining agreement and did not require a construction of the collective bargaining agreement. App.1-2.[1] The Court of Appeals affirmed the District Court's decision on May 11, 1994. 23 F.3d 1444. App. 5.

[1] "App." herein refers to the appendix filed with this Petition.

ARGUMENT

Petitioner contends that this Court should grant the Petition for a Writ of Certiorari pursuant to Rule 10.1(c) of the Rules of this Court because the decision of the Court of Appeals conflicts with the decision of this Court in *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994). In that case, an employee was terminated after refusing to sign aircraft maintenance records certifying that maintenance work had properly been performed on an airplane because of his safety concerns. He brought suit under Hawaii's Whistleblower Protection Act, Haw. Rev. Stat. §§ 378-61 to 378-69 (1988)[2], and for breach of the collective bargaining agreement which covered his employment. After removal, the United States District Court for the District of Hawaii dismissed the breach of contract claim on the basis that it was preempted by the Railway Labor Act, and remanded the other claim to the state court. The Hawaii trial court dismissed the whistleblower claim on the basis that it was preempted by the Railway Labor Act, but the Hawaii Supreme Court reversed concluding that the Railway Labor Act did not preempt the state court tort action. *Norris v. Finazzo*, 74 Haw. 235, 842 P.2d 634 (1992); *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 648, 847 P.2d 634 (1993). This Court granted certiorari (114 S.Ct. 908), and by a unanimous decision, affirmed the Hawaii Supreme Court, finding that state law rights which exist independently of a collective bargaining agreement are not preempted by federal labor laws. 114 S.Ct. at 2247.

---

[2]The Hawaii Whistleblower Protection Act forbids an employer to "discharge, threaten, or otherwise discriminate against an employee . . . because . . . [t]he employee . . . reports or is about to report to a public body . . . a violation or a suspected violation of a law or rule adopted pursuant to a law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false." § 378-62(1). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. § 378-63(a).

In the instant case, Petitioner's whistleblower claim is based upon his allegation that his discharge was motivated by his report of violations of the Drug Free Workplace Act of 1988, 41 U.S.C. §§ 701 et seq., which Respondent, as a government contractor, was obligated to comply with. The Court of Appeals strains to distinguish this case from *Norris* on the basis that Norris' claim was based on a state statute and Petitioner's is not. 23 F.3d at 1447. That, of course, is no distinction at all.

In *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo.App. 1985), the Missouri courts recognized a public policy exception to Missouri's employment at will doctrine. Under that exception, employers "are not free to require employees, on pain of losing their jobs, to commit unlawful acts or acts in violation of a clear mandate of public policy expressed in the constitution, statutes and regulations promulgated pursuant to statute." *Ibid.* at 877. See also *Smith v, Arthur C. Baue Funeral Home*, 370 S.W.2d 249, 254 (Mo. 1963); *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275-276 (Mo. banc 1984). This exception protects so-called "whistleblowers" who are discharged for reporting violations of law. *Petersimes v. Crane Co.*, 835 S.W.2d 514 (Mo.App. 1992). That situation fits Petitioner's case exactly; and it makes no difference whether his claim arises under a state statute or judicially created law. The mere fact that his employment was covered by a collective bargaining agreement does not negate his independent state court action. That is the fundamental rule and the teaching of this Court's decision in the *Norris* case.

The public policy exception to Missouri's employment at will doctrine is not available to contract employees. *Luethans v. Washington University*, 838 S.W.2d 117, 120 (Mo.App. 1992). However, the Missouri Courts have defined a contract employee as an employee who has a contract for a "definite period of time." *McCloskey v. Eagleton*, 789 S.W.2d 518, 519 (Mo.App. 1990), citing *Amaan v, City of Eureka*, 615 S.W.2d 414, 415 (Mo. banc

1981), cert. den. 454 U.S. 1084, 102 S.Ct. 642, 70 L.Ed.2d 619 (1981). See also *Petersimes v. Crane Co.*, supra at 515; *Crockett v. Mid-America Health Services*, 780 S.W.2d 656, 657 (Mo.App. 1989). Indeed, even *Komm v. McFlicker*, 662 F.Supp. 924 (W.D.Mo. 1987), relied upon by the District Court in granting summary judgment in favor of Respondent (App. pg.), recognized that the term contract employees is limited to "definite term employees." *Ibid.* at 924-925.

The collective bargaining agreement under which Petitioner was employed establishes the wages, hours and other terms and conditions of employment under which he was employed; but it clearly does not establish employment for a definite term. Indeed, the agreement recognizes the possibility of discharge at any time. Art. II, App. pg. 13, Art. VII, Sec. 1, App. pg.17, Art. XV, App. pg. 26, Art. XVIII, App. pg. 28. Indeed, unlike many collective bargaining agreements, the agreement in this case does not even limit discharges to "just cause". Therefore, the mere fact that Petitioner was covered by a collective bargaining agreement during the term of his employment does not preclude him from pursuing his independent state claim for wrongful discharge.

A state-law tort claim is independent of a collective bargaining agreement if the claim is not dependent upon the agreement and does not require the construction of the agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *Wolfe v. Central Mine Equipment Co.*, 850 F.2d 469, 470 (8th Cir. 1988). Or, stated conversely, "a state-law tort action against an employer may be pre-empted by Sec. 301 [29 U.S.C. Sec. 185] if the duty to the employee of which the tort is a violation is created by a collective bargaining agreement and without existence independent of the agreement." *Steelworkers v. Rawson*, 495 U.S. 362, 369, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990). The touchstone is whether "the resolution of a state-law claim depends upon the meaning of the collective bargaining agreement" for its resolution. *Lingle v.*

Norge Div. of Magic Chef, Inc., 486 U.S. at 405-406. Of course, Petitioner's state-law claim is not created by the collective bargaining agreement, and does not require a construction of the agreement for its resolution. Therefore, the mere existence of the collective bargaining agreement should not preclude Petitioner from pursuing that claim.

Indeed, if the State of Missouri adopted a rule which limited the availability of whistleblower claims for employees covered by a collective bargaining agreements, that rule would be pre-empted by federal labor laws because it would have the effect of depriving employees represented by a union of state remedies for wrongful discharge. In *Livadas v. Bradshaw*, 114 S.Ct. 2068 (1994), this Court was called upon to decide that issue under circumstances where the Commissioner of Labor of the State of California ruled that wage and penalty provisions of California law generally available to discharged employees was not available to employees covered by a collective bargaining agreement. Justice Souter, speaking for a unanimous Court, observed that "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in state-law litigation plainly does not require the claim to be extinguished." *Ibid.* at 2078. See also *Lingle v. Norge Div. of Magic Chef, Inc.*, supra. Thus, the decision of the Court of Appeals conflicts with this Court's decision in *Livadas* as well as *Norris*.

For these reasons, the Petition for a Writ of Certiorari should be granted.

CONCLUSION

Rule 10.1(c) provides that a ground for granting a petition for a writ of certiorari is that a decision of a United States court of appeals conflicts with applicable decisions of this Court. That is precisely the case here.

The Court of Appeal's holding that Petitioner was precluded from pursuing his state-law wrongful discharge claim merely because he was covered by a collective bargaining agreement is in conflict with this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239 (1994), where on very similar facts this Court held that a discharged employee's whistleblower claim was not precluded because he had been employed pursuant to a collective bargaining agreement. The Court of Appeals' attempt to distinguish this case from *Norris* on the basis that Petitioner is pursuing his wrongful discharge claim based upon a judicially-created state-law right rather than pursuant to a state statute (23 F.3d at 1447) is not a relevant distinction at all. The reasoning of this Court in *Norris* does not turn on the origin of the state-law claim. Rather, the Court's ruling in *Norris* is predicated upon an analysis of whether the state-law claim is "independent of the collective bargaining agreement." 114 S.Ct. at 2251. See also *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). That certainly is the case here because Petitioner's wrongful discharge claim does not arise from rights created by the collective bargaining agreement, and does not depend upon a construction of the collective bargaining agreement for its resolution.

In something of a converse of this situation, this Court held in *Livadas v. Bradshaw*, 114 S.Ct. 2068 (1994), that a state may not impose restrictions on pursuit of state-law rights merely because an individual was covered by a collective bargaining agreement because to do so "poses special dangers that advantages conferred by federal law will be cancelled out and its objectives

undermined." 114 S.Ct. at 2081. Thus, if the State of Missouri would impose a restriction on Petitioner's right to pursue his wrongful discharge claim merely because he was covered by a collective bargaining agreement, it would run afoul of *Livadas*. The decision of the Court of Appeals in interpreting state law in that fashion is likewise directly in conflict with this Court's decision in *Livadas*.

Therefore, the Petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Eighth Circuit because that decision is in conflict with applicable decisions of this Court.

Respectfully submitted,

Clyde E. Craig
(Counsel of Record for Petitioner)
9020 Manchester Road
St. Louis, Missouri 63144
(314) 961-5100

Of Counsel:
Craig & Nangle, P.C.

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS H. EGAN,
Petitioner,

vs.

WELLS FARGO ALARM SERVICES,
also known as BAKER PROTECTIVE SERVICES, INC.,
Respondent.

PROOF OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari were served on Respondent's attorney of record, Thomas M. Hanna, 2730 North Ballas Road, St. Louis, Missouri 63131 by regular mail, correctly addressed and postage prepaid, on this 9th day of August, 1994.

Clyde E. Craig
(Counsel of Record for Petitioner)
9020 Manchester Road
St. Louis, Missouri 63144
(314) 961-5100

Of Counsel:
Craig & Nangle, P.C.

APPENDIX

INDEX TO APPENDIX

Page

APPENDIX A

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI DATED JULY 8, 1993 ..... A-1

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MAY 11, 1994 ..... A-5

APPENDIX C

COLLECTIVE BARGAINING AGREEMENT BETWEEN WELLS FARGO DIVISION OF BAKER PROTECTIVE SERVICES AND LOCAL UNION NO. 1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO/CLC A-11

APPENDIX D

STATUTES INVOLVED

28 U.S.C. Sec. 1254(1) A-53

28 U.S.C. Sec. 1291 ..... A-54

28 U.S.C. Sec. 1294(a) A-55

28 U.S.C. Sec. 1332(a)(1) A-56

41 U.S.C. Secs. 701 *et seq.* A-58

Haw. Rev. Stat. Secs. 378-61 to 378-69 ..... A-72

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1970-C (9)

THOMAS H. EGAN,
Plaintiff,

v.

WELLS FARGO ALARM SERVICES,
a division of BAKER PROTECTIVE SERVICES, INC.,
Defendant.

ORDER

In accordance with the Memorandum filed herewith this date,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment in favor of the defendant and against plaintiff on Count II of plaintiff's first amended complaint. Costs of this action to be assessed against plaintiff.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 8th day of July, 1993.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-1970-C (9)

THOMAS H. EGAN,
Plaintiff,

v.

WELLS FARGO ALARM SERVICES,
a division of BAKER PROTECTIVE SERVICES, INC.,
Defendant.

MEMORANDUM

This matter is before the Court on defendant's motion for summary judgment on Count II of plaintiff's first amended complaint.[1] Plaintiff opposes the motion.

Plaintiff brings this action alleging that he was wrongfully discharged from his employment in retaliation for reporting violations of the Drug-Free Workplace Act of 1988, 41 U.S.C. §701 *et seq.*. In its motion for summary judgment defendant asserts that plaintiff never reported violations of the Act to his supervisors and that plaintiff was terminated pursuant to the terms of his union contract.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the

---

[1] Judgment was entered in favor of defendant on Count I of plaintiff's first amended complaint on March 31, 1993.

light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson* v. *Liberty Lobby Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*., 475 U.S . 574 , 586-587 (1986); Fed. R. Civ. P . 56 (c) . Once he moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56 (e). Rule 56 (C) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986).

In his response to defendant's motion for summary judgment, plaintiff asserts that his claim is based upon the "whistle blower" exception to the Missouri employment at will doctrine. Thus, plaintiff argues that his claim for wrongful discharge is viable because it falls within a recognized public policy exception to the employment at will doctrine. *See Beasley v. Affiliated Hospital Products*, 713 S.W.2d 557 (Mo.App. 1986).

Attached to-defendant's motion for summary judgment is the affidavit of Bill Mansfield, the manager of the defendant's St. Louis branch. In his affidavit Mr. Mansfield states that plaintiff as terminated pursuant to the terms of a collective bargaining agreement between defendant and IBEW Local 1. Article VIII, Section 2 of the collective bargaining agreement, a copy of which is attached to defendant's motion for summary judgment, provides than an employee's service for seniority purposes is deemed broken by reason of an absence that exceeds 12 months.

According to the defendant, such a break in service is the equivalent of termination. It is undisputed that plaintiff was absent from work for a period in excess of 12 months. In addition, the plaintiff does not dispute that his employment was governed by the terms of the collective bargaining agreement.

In general, the employment at will doctrine provides that "an employer can discharge — for cause or without cause — an at will employee . . . and still not be subject to liability for wrongful discharge." *Johnson v. McDonnell-Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. banc. 1988) [quoting *Dake* v. *Tuell*, 687 S.W.2d 191, 193 (Mo. banc. 1985)]. Missouri has carved out a narrow exception to the at-will doctrine for "whistle-blowers." *See Id.* at 663.

In the present case, however, plaintiff was not an at will employee. He was a contract employee employed under the terms of a Collective bargaining agreement. Missouri does not recognize the public policy exception to the employment at will doctrine for contract employees. *Komm v. McFlicker*, 662 F.Supp. 924, 924-925 (W.D. Mo. 1987); *Luethans v. Washington University*, 838 S.W.2d 117, 120 (Mo.App. 1992). Accordingly, plaintiff cannot maintain a claim based on the public policy exception to the Missouri employment at will doctrine. The defendant is, therefore, entitled to judgment as a matter of law on Count II.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES
DISTRICT JUDGE

Dated this 8th day of July, 1993

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2963

Thomas H. Egan,
Appellant,

v.

Wells Fargo Alarm Services,
also known as Baker Protective Services, Inc.,
Appellee

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 11, 1994
Filed: May 11, 1994

Before BOWMAN, Circuit Judge, BRIGHT and ROSS, Senior Circuit Judges.

BRIGHT, Senior Circuit Judge.

Thomas H. Egan, a former employee of Wells Fargo Alarm Services, brought this action for damages, reinstatement and other relief alleging that Wells Fargo, although authorized to terminate Egan for excessive absence under his union collective bargaining agreement, actually discharged him in retaliation for whistle blowing activity in violation of Missouri's public policy exception to the at-will employment doctrine.[1]

[1] Missouri's at-will employment doctrine provides that "an employer can discharge for cause or without cause an at-will employee who does not otherwise fall within the protective reach of a contrary statutory provision." *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 870-71 (Mo. Ct. App. 1985) (internal citation omitted). *Boyle*, however, recognized a narrow exception to

(Footnote 1 continued on next page)

The district court[2] summarily rejected Egan's complaint, determining that as a matter of law Egan worked as a contract employee under a union collective bargaining agreement, and that therefore he could not claim protection from the public policy exception, which applies only to at-will employees. Egan appeals from the district court's grant of summary judgment dismissing the action. We affirm.

I. BACKGROUND

Egan brought this wrongful discharge claim asserting that Wells Fargo, a government contractor, terminated him because he reported to company management, and then to the FBI, instances of Wells Fargo's non-compliance with the Drug-Free Workplace Act. 41 U.S.C. § 701 *et seq.* (1988).

(Footnote 1 continued)

the at-will doctrine in cases where an employee is discharged for complying with, or for refusing an employer's request not to comply with, a clearly established public policy emanating from state or federal law. The *Boyle* court concluded:

> [W]here an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.

Id. at 878.

Several courts interpreting Missouri law have followed *Boyle* in recognizing the existence of a public policy exception to the at-will doctrine, *see, e.g.*, *Petersimes v. Crane Co.*, 835 S.W.2d 514, 516 (Mo. Ct. App. 1992); *Link v. K-Mart Corp.*, 689 F. Supp. 982, 984 (W.D. Mo. 1988), although the Missouri Supreme Court has yet to adopt the public policy exception.

[2] The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

In an unpublished memorandum opinion, the district court related these undisputed facts: that the terms of the collective bargaining agreement between Wells Fargo and Local Union No. 1, International Brotherhood of Electrical Workers, AFL-CIO, governed Egan's employment; that under the collective bargaining agreement absence from work for more than twelve months breaks an employee's seniority and such break is the equivalent of termination; and that Egan absented himself from work for a period in excess of twelve months.

The district court granted Wells Fargo's Motion for Summary Judgment on the grounds that Egan possessed no valid state law claim. The district court determined (1) that Egan did not qualify as an at-will employee because of his coverage under the union contract, and (2) that the Missouri public policy exception does not apply to contract employees, citing *Komm v. McFliker*, 662 F. Supp. 924, 924-25 (W.D. Mo. 1987) and *Luethans v. Washington University*, 838 S.W.2d 117, 120 (Mo. Ct. App. 1992) (dictum).

II. DISCUSSION

We review a grant of summary judgment *de novo*, applying the same standard used by the district court. *Rafos v. Outboard Marine Corp.*, 1 F.3d 707, 708 (8th Cir. 1993). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c).

Egan concedes at the outset that under Missouri law, contract employees — those employed for a "definite term" and who cannot be discharged without just cause — have no state law cause of action for wrongful discharge. *See Komm*, 662 F. Supp. at 924-25 (Missouri public policy exception limited to at-will employment relationships); *Luethans*, 838 S.W.2d at 120 n.1 (same). Thus, the sole issue in this case is whether Egan was a contract employee or an employee-at-will. Although resolving

this issue compels us to examine Egan's status under the provisions of the collective bargaining agreement between Wells Fargo and Egan's union, we agree with the appellee that Egan's preemption arguments are irrelevant. Egan asserts a cause of action under state law; he can only maintain that action if he is an at-will employee.

Egan contends that he served as an at-will employee because his union collective bargaining contract fails to specify a term of employment, and further lacks specific language limiting the employer's discharge rights to instances in which it can demonstrate "just cause".

We reject Egan's argument. The collective bargaining agreement grants non-probationary union employees such as Egan job protection during the three-year term of the union contract by providing "continued employment" of union members (Article II); protection against "lockouts" (Article VII, Section 1); seniority rights relating to filling vacancies, job creations, decreases in force, layoffs and rehiring after layoffs (Article VIII); wage protections and other benefits (Article XI, XII); and procedures for employees to grieve alleged violations by Wells Fargo of its obligations under the agreement (Article XIII). Moreover, Article XV impliedly contrasts the contract rights of non-probationary employees with those of probationary employees. The employer has the right to discharge probationary employees "with or without cause"; probationary employees cannot avail themselves of Article XIII grievance procedures. While the agreement does not contain an explicit "just cause" or "good cause" provision, the clear implication of Article XV is that non-probationary union employees, in contrast to probationary employees, may not be terminated at-will or without good cause. Thus, a worker's employment appears to continue for the duration of that collective bargaining agreement (a "definite term"), so long as he remains a union member in good standing, and so long as he is not discharged for just cause.

Viewed as a whole, the provisions of the collective bargaining agreement support the district court's conclusion that Egan was a contract employee, not one at-will. Thus, the district court did not err in refusing to give Egan the benefit of the public policy exception.[3]

---

[3] We observe that Wells Fargo's attempt to analogize Missouri law to Illinois law, and the company's reliance on *Lamb v. Briggs Manufacturing a Division of Celotex Corp.*, 700 F.2d 1092 (7th Cir. 1983) (state law retaliatory discharge tort limited to at-will employees), is misplaced. Illinois law now appears to permit employees covered under a collective bargaining agreement to bring state law retaliatory discharge claims against employers under certain circumstances. *See Midgett v. Sackett-Chicago Inc.*, 473 N.E.2d 1280, 1283-84 (Ill. 1984) (permitting contract employee to bring tort action against employer for discharge in retaliation for filing of workers/ compensation claim), *cert. denied*, 474 U.S. 909 (1985); *Driveaway and Truckaway Service. Inc. v. Aaron Driveaway & Truckaway Co.*, 781 F. Supp. 548, 552 (N.D. Ill. 1991) (acknowledging *Midgett*'s extension of retaliatory discharge tort beyond at-will employees, but declining to extend rule to agent non-employee). *Midgett* and *Driveaway and Truckaway* explain that extending the public policy exception to cover contract employees serves two distinct purposes: first, it equalizes the rights of contract and at-will employees by permitting contract employees to recover punitive damages to the same extent as at-will employees for the same employer conduct; second, it deters employers, via the threat of punitive damages, from retaliating against *any* employee whose conduct comports with established public policy.

In another recent case the Hawaii Supreme Court determined that the Hawaii Whistleblower's Protection Act (HWPA) protects both unionized contract employees and at-will employees from being discharged in violation of public policy. *Norris v. Hawaiian Airlines Inc.*, 842 P.2d 634, 645 (Haw. 1992), *cert. granted*, 114 S. Ct. 908 (1994). Norris, a union airplane mechanic, blew the whistle on what he perceived to be shoddy repair work. After grieving his discharge unsuccessfully, he brought a state tort claim of retaliatory discharge in violation of public policy. The Hawaii Supreme Court determined that federal law did not preempt Norris' claim, and held that the HWPA permitted Norris to bring his state tort claim for retaliatory discharge because resolving his claim did not depend on interpretation of the collective bargaining agreement. Of course, *Norris* is distinguishable from the instant case in that Egan cannot point to a *statute* protecting him from discharge.

(Footnote 3 continued on next page)

III. CONCLUSION

Accordingly, we affirm the judgment of the district court based on its well-reasoned opinion, supplemented by the analysis and authorities cited above.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Footnote 3 continued)

Though one might agree with the policy analysis of the Illinois courts or favor the statutory protection available in Hawaii, this court is bound by Missouri case law which permits only at-will employees to bring retaliatory discharge actions under the public policy exception such as discussed here.

APPENDIX C

PLAINTIFF'S EXHIBIT 22

AGREEMENT BETWEEN

LOCAL UNION NO. 1,
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

AND

WELLS FARGO ALARM SERVICES
A Division of
BAKER PROTECTIVE SERVICES, INC.

ST. LOUIS

Effective Date: October 27, 1990

INDEX

ARTICLE	TITLE	PAGE
I	Recognition	1
II	Union Security	2
III	Check-off	2
IV	Hours	3
V	Health and Safety	3
VI	Union Stewards	4
VII	Strikes and Lockouts	4
VIII	Seniority	4
IX	Vacations	5
X	Holidays	7
XI	Wages	8
XII	Distribution of Overtime	9
XIII	Adjustment of Grievances	10
XIV	Management Rights	11
XV	Probationary Employees	12
XVI	Miscellaneous Provisions	12
XVII	Severability	13
XVIII	Security Clearance	13
XIX	Jury Duty and Burial Clause	13
XX	Pension	14
XXI	Drug-Free Workplace	15
XXII	Duration of Agreement	15

EXHIBITS

A	Hourly Wage Progression Schedule
A-1	Installation Trainee Criteria
A-2	Installation Technician Criteria
A-3	Service Trainee Criteria
A-4	Service Technician Criteria
B	Hourly Wage Progression Schedule
B-1	Central Station Operator Criteria
C	Grievance Form

LABOR AGREEMENT

THIS AGREEMENT, made and entered into as of this 27th day of October, 1990 by and between the ST. LOUIS BRANCH OF WELLS FARGO ALARM SERVICES, a Division of Baker Protective Services, Inc., or its successors, hereinafter referred to as the " Employer", and LOCAL UNION NO. 1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, affiliated with AFL-CIO, or its successors, hereinafter referred to as the "Union", agree as follows:

ARTICLE I - RECOGNITION

SECTION 1

The Employer and the Union are desirous of promoting a better understanding between themselves in their relationship as employer and employees' representative. The parties mutually agree to prevent strikes, interferences with production and business, lock-outs and misunderstandings. The parties are desirous of settling in a peaceful manner all misunderstandings, disputes and grievances that may arise between them.

SECTION 2

The Employer recognizes the Union as sole and exclusive representative for purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment for all full-time and regular part-time employees of the Operating and Field Service Departments, but excluding Clericals, Guards, Watchmen, Professional and Supervisory employees, which unit was certified by the National Labor Relations Board on June 19, 1951, NLRB Case #14-RC-1442, and which certification was by said NLRB amended on the 25th day of September, 1958.

SECTION 3

The Employer may hire regular part-time employees to aid in covering hours which may have unusual workloads, and casual employees to cover for regularly scheduled employees when not present. Casuals will not be required to join the Union and will not receive benefits other than wages. Regular part-time employees will not receive health insurance but will receive other benefits and seniority on a prorated basis according to hours worked.

ARTICLE II - UNION SECURITY

It is understood and agreed by and between the parties hereto that, as a condition of continued employment, every employee who is covered herein shall become a member of the Union on the thirty-first (31st) day following the beginning of his/her employment, and that as a requirement of continuous employment, such employee shall be at all times a member in good standing of the Union so long as he/she continues payment (or tender) of the periodic dues of the Union. The failure of any person to become a member of the Union at such time shall obligate the Employer, upon written notice from the Union to such effect and to the further effect that Union membership was available to such person on the same terms and conditions generally available to other members, to within thirty (30) days of receipt of such notice discharge such person. Further, the failure of any person to maintain his/her Union membership in good standing by failure to pay (or tender payment of) periodic dues of the Union shall, upon written notice to the employer by the Union to such effect, obligate the Employer to discharge such person within thirty (30) days of the receipt of such notice.

The Union agrees to hold the Employer harmless against any demand, claim, damage suit, or any other form of action arising out of any Union demand for the discharge of any employee pursuant to the terms of this Agreement in any and all cases

where the Employer complies with the Union's demand in reliance upon a written statement of fact respecting membership in the Union, if and when it shall be determined that such written statement is untrue.

ARTICLE III - CHECK-OFF

It is understood and agreed between the Employer and the Union that the Employer will deduct any back unpaid union dues owed the Union (providing such indebtedness for dues was incurred during employment with the Employer) as well as current monthly union dues from the paycheck of every employee who has signed proper legal authorizations for such deductions and who is covered by this Agreement on the last pay day of the month preceding the month for which current union dues are due the Union. The Employer further agrees to remit to the Financial Secretary of the Union, all monies so deducted from the employee's paycheck immediately. The amounts of all such deductions shall be certified by the Union to the Employer.

The Union agrees to hold the Employer harmless against any demand, claim or damage suit, or any other form of action arising out of any act which was taken by the Employer pursuant to a request by the Union under the terms of this article.

ARTICLE IV - HOURS

SECTION 1

It is understood by and between the parties that the Employer operates a twenty-four (24) hour day, seven (7) days a week, protection service and that by reason of its business it must have employees on duty every hour of every day, and because of this fact must have night and evening shifts, and shifts on Saturdays, Sundays and holidays.

It is understood, further, by and between the parties that because of the nature of the Employer's business, neither the work week

nor the shift for all of the employees in the unit covered by this Agreement can be the same. The Employer will assign work weeks and shifts to particular employees, and will take into consideration the desires of the employees involved, together with the seniority (as hereinafter defined) of the employees involved.

Forty (40) hours shall constitute a regular work week, which such forty (40) hours shall be composed of five (S) eight (8) hour regularly scheduled work days.

SECTION 2

All work in excess of eight (8) hours per day or forty (40) hours per week shall be paid for at the rate of time and one-half. An employee shall not be required to work in excess of twelve (12) hours per day, except on a voluntary basis.

ARTICLE V - HEALTH AND SAFETY

Adequate facilities shall be provided by the Employer in each department for hanging employees' clothing and also adequate washing and toilet facilities.

Precautions to secure the health and safety of employees shall as far as practicable be at all times taken by the Employer, including the supply of first aid cabinets at convenient locations throughout the various departments.

Employees shall observe all safety rules promulgated by the Employer.

ARTICLE VI - UNION STEWARDS

The Union Stewards who represent the Union shall be designated by the Union's Business Manager. There shall be one steward for each department or group to be represented: Service Department, Installers, Operators and Testers. Should there be any other departments or recognized Sub-Departments estab-

lished within the Bargaining Unit, the Business Manager will designate or appoint a Steward for such.

The Union Stewards shall have no authority to call a strike. They shall be recognized as representing the Business Manager.

ARTICLE VII - STRIKES AND LOCKOUTS

SECTION 1

The Union agrees that during the term of this Agreement it will not engage in, authorize, induce or encourage any strikes, slow-ups, sitdowns, sympathy strikes, secondary boycotts or stoppages of work. The Employer agrees that there shall be no lockouts. Any individual or group violating the above shall be immediately discharged.

SECTION 2

The Employer agrees not to sue the Union for any violation(s) of this Agreement which were not engaged in or authorized by such Union.

ARTICLE VIII - SENIORITY

SECTION 1

Seniority within the bargaining unit shall be considered when filling vacancies, job creations, decreases in force, layoffs and rehiring after layoffs. The following factors shall be taken into consideration: (1) skill and ability to perform the work; (2) physical fitness; (3) length of continuous service. Only when both factors (1) and (2) are relatively equal shall length of continuous service (3) be the determining factor. Continuous service shall be deemed to begin at the date of original employment, on the thirty- first (31st) day following such date of original employment. Job vacancies shall be posted with no exception and persons desiring to bid on job vacancies will be permitted to submit their hid within fourteen (14) calendar days from the date of the posting.

SECTION 2

Continuous service for seniority purposes shall not be deemed broken by reason of absence due to sickness, injury, or by leave of absence due to sickness or injury, or by leave of absence granted by the employer, or by reason of layoff due to lack of work, provided each such absence above enumerated does not exceed one (1) year in duration or six (6) months for employees hired on or after November 1, 1990.

Leave of absence not to exceed one (1) year shall be granted employees to enable them to perform official duties for the Union without prejudice to their seniority rights, anything hereinbefore to the contrary not-withstanding. Provided, however, such leaves of absence for Union activity will be granted only upon two weeks advance written notice and but one employee shall be out on such leave at any one time.

SECTION 3

The Employer agrees to keep a record of the length of continuous service of each employee covered by this Agreement, which such list shall be made available to the Union and the shop stewards at any reasonable time upon its request. The list so kept will be kept current at all times.

SECTION 4

Department seniority will prevail. If employees who have two (2) years seniority with the Employer wish, they may apply for jobs in other departments. If and when openings are available, they may be given preference over new hires, if equally qualified. If within six (6) months, there is a reduction in force in that new department, those employees will be allowed to return to their former departments and will retain their seniority in those departments. It is understood that they will have new departmental seniority when entering a new department.

ARTICLE IX - VACATIONS

SECTION 1

The vacation period for employees covered by this Agreement shall be from April 1st of any one year to March 31st of the succeeding year. All employees covered by this Agreement who on April 1st of any year have completed one (1) year but less than three (3) years of continuous service with the Employer shall receive one (1) week's vacation with pay, and shall be paid therefore forty (40) hours at the regular straight time rate at the time of taking such vacation.

All employees covered by this Agreement who on April 1st of any year have completed three (3) or more years of continuous service with the Employer shall receive two (2) weeks vacation and be paid therefore eighty (80) hours at their regular straight time rate at the time of taking such vacation. Employees who on April 1st of any year have completed eight (8) years or more of continuous service with the Employer shall receive three (3) weeks vacation and be paid therefore one hundred twenty (120) hours at their regular straight time rate at the time of taking such vacation. Employees who on April 1st of any year have completed twenty (20) years or more of continuous service with the Employer shall receive four (4) weeks vacation and be paid therefore one hundred sixty (160) hours at their regular straight time rate at the time of taking such vacation. It is agreed that no two vacation periods to which an employee is entitled can be coupled or merged.

Employees who on April 1st of any year have been continuously employed less than twelve (12) months but more than six (6) months shall be entitled to a vacation with pay and shall be paid therefore in proportion that the number of months they have worked bears to the vacation pay granted to employees having one (1) year and less than three (3) on April 1st. Such vacations shall be assigned without regard to seniority or length of service

at such time during the vacation period as the Employer shall assign. For example, an employee who has been continuously employed for ten (10) months on April 1st of any one year will receive ten-twelfths (10/12) of forty (40) hours, or thirty-three and-one-third (33 1/3) hours vacation and be paid therefore at his then straight time hourly rate.

SECTION 2

The Employer will, in advance of the vacation period, circulate a list of employees, listed by length of service, and the employees will promptly by seniority designate the period desired for their vacations. It is the intention that vacations shall, by this system, be taken evenly over the vacation period, and the Employer shall have the right to limit the number of employees who take their vacation in any one week. There shall be no carryover or accumulation of vacation time between vacation periods.

SECTION 3

Vacation pay shall be paid on the last regularly scheduled working day prior to the vacations.

SECTION 4

All employees starting to work before the 16th day of the first month of their employment shall receive vacation credit for the first month of employment.

SECTION 5

The parties agree that whenever a holiday mentioned in Article X, Section 1, of this Labor Agreement falls within an employee's vacation period the Employer will grant an additional day of vacation, subject to the provisions of Article X, Section 1, or if mutually agreeable eight (8) hours straight time pay in lieu thereof.

ARTICLE X - HOLIDAYS

SECTION 1

All employees who shall have worked their shift as directed by the Employer both the last scheduled work day immediately prior to and the first scheduled work day immediately after (or who have an excuse acceptable to the Employer for not having worked one or both of such days) shall receive a holiday (but not necessarily the holiday) for each of the following holidays:

New Year's Day
Good Friday
Memorial Day
Fourth of July
Labor Day
Thanksgiving Day
Day After Thanksgiving
Christmas Eve
Christmas Day

Memorial Day shall be celebrated on the day established for Federal employees. A holiday shall be observed on the calendar day except that a holiday falling on a Saturday will be observed on the preceding Friday, and a holiday falling on a Sunday will be observed on the following Monday.

In addition to the holiday schedule, employees having obtained seniority shall be afforded two (2) floating holiday per calendar year. If the date of such holiday cannot be agreed upon the employee shall pick the month and the week for such and the Employer shall pick the day. Floating holidays may not be taken on conservative dates without prior approval of branch management.

SECTION 2

Because of the nature of the Employer's business, the parties agree it is necessary to work on holidays and employees requested by the Employer to work on a holiday will do so.

SECTION 3

Employees entitled to a holiday who do not work on the holiday will receive pay therefore at their then regular straight time hourly rate times eight (8).

SECTION 4

Employees entitled to a holiday who are required to work on that holiday shall have the option to elect to receive holiday premium pay for that day or instead, to receive another working day off in lieu of the holiday.

SECTION 5

The Employer will endeavor to list one (1) week in advance of any of the previously listed holidays the names of the employees who are to work on such holidays, and also list which days employees who work on the holidays will receive off, if any. The Employer will endeavor to schedule work on holidays to allow employees to receive holidays off at some time during the year.

ARTICLE XI - WAGES

SECTION 1

Employees in the bargaining unit covered by this Agreement shall be paid in accordance with their classification and according to the wage schedules, which such classifications and wage schedules are incorporated into Exhibits A and B attached hereto and made a part hereof. Specific Job Performance Criteria for these classifications are contained in Exhibits A-1, A-2, A-3, A-4 and B-1.

The Employer reserves the right to determine the number of employees in each Classification, and to limit the advancement of any employee into a higher paying Classification based on such employee's qualifications for the position as exhibited by job performance, and based on the needs of the business, as determined by the Employer.

SECTION 2

Starting rates for probationary employees shall be as disclosed by the Exhibits mentioned in Section 1 of this article.

SECTION 3

Nothing contained in this Agreement shall prevent the Employer from paying over the wages set forth in this article.

SECTION 4

Progression increases brought about by this Agreement shall be put into effect the first day of the first pay week after such increase is due, but general contract anniversary increases will be put into effect the day due.

SECTION 5

When the Lead Operator is not working the Assistant Lead Operator assumes that duty without a change in rate of pay. If the Lead Operator or the Assistant Lead Operator is not on duty and someone assumes that duty, such employee will be paid at the Assistant Lead Operator's rate of pay.

ARTICLE XII - DISTRIBUTION OF OVERTIME

The Employer will maintain a call list for service and operating personnel for purposes of overtime rotation. When the Employer deems overtime work necessary, such overtime shall be distributed as equally as possible among the employees capable of performing the Job, provided, however, preference shall be given an employee to complete a job he is currently performing, if, in the opinion of the Employer, he is capable of performing the job.

Due to the nature of the business and circumstances over which the Employer has no control it is recognized some overtime work is required and employees will perform overtime work if asked,

subject to the first paragraph of this article, except and only in the event of extreme hardship.

ARTICLE XIII - ADJUSTMENT OF GRIEVANCES

Should one or more employees maintain that the Employer has violated an obligation to such employee or employees, provided in this Agreement, there shall be an earnest effort on the part of both parties to settle such promptly through the following steps:

SECTION 1

The aggrieved employee or employees shall first take the matter up with the immediate supervisor or foreman. The aggrieved employee(s) will have the steward with him/her (them) if he/she (they) so desires. This shall be done within five (5) working days of the incident, or within five (5) working days of when the employee had knowledge of the occurrence of the incident or all rights under this article shall be considered settled.

SECTION 2

If the employee or the steward does not obtain a satisfactory settlement upon taking it up with the foreman, the steward shall then file a grievance in writing within five (5) working days with the same foreman, and the foreman shall give his answer in writing within five (5) working days of the receipt of the written grievance. All grievances reduced to writing shall be signed by the party or parties claiming to be aggrieved, or their representative, and shall be filed upon the form which is attached hereto, marked exhibit C and by reference made a part hereof.

SECTION 3

If the foreman's written answer is unsatisfactory, the grievance shall then be taken up by the Employer's representatives and the Union's representatives within three (3) working days of the Union's receipt of the foreman's written answer, provided the Union so requests it be taken up.

SECTION 4

If the grievance is not taken to the next step within five (5) working days (unless such time is by mutual agreement between the parties extended) after any of the preceding steps, the grievance shall be considered as having been settled.

SECTION 5

If no agreement has been reached pursuant to the procedure specified in Sections 1, 2 and 3, both parties reserve the right to request Arbitration of the dispute within ten (10) working days after the meeting referred to in Section 3 hereof. If Arbitration is requested by either party, the Employer and Union agree to submit the grievance to Arbitration as provided for in this Agreement and as soon as practicable.

SECTION 6

If the grievance is submitted to Arbitration, the Employer and the Union agree to accept as final and binding on both parties the decision of an Arbitrator agreed to by the Employer and the Union. If the employer and Union are unable to agree upon an Arbitrator they shall select an impartial Arbitrator from lists supplied by the American Arbitration Association in the usual manner prescribed by the Association. The expense of the Arbitrator selected or appointed shall be borne equally by the employer and the Union.

It is understood and agreed that the Arbitrator shall have no answer to alter, eliminate, amend, add to, or subtract from any of the terms of this Agreement, but shall determine only whether there has been a violation of this Agreement in the respect alleged in the written grievance or a submission agreement of the Union and the employer, if any, setting forth the issues which are submitted to the Arbitrator.

Not more than one grievance shall be submitted to Arbitration in the same proceeding without the mutual consent of the Employer and the Union.

SECTION 7

A binding settlement may be reached at any step of the grievance procedure. The time limits referred to above shall be adhered to unless extended by mutual agreement between the parties.

ARTICLE XIV - MANAGEMENT RIGHTS

The Employer retains and shall continue to have the complete and exclusive right and power to manage its operations and direct its working force except as expressly limited by specific obligations of the Employer set forth in this Agreement.

ARTICLE XV - PROBATIONARY EMPLOYEES

It is agreed that all new employees shall be given a trial period not to exceed ninety (90) calendar days. No employees shall be placed on the length of service roster until the probationary period of ninety (90) calendar days has expired. During the probationary period the Employer has the right to discharge such employee with or without cause, and such discharge shall not be subject to the grievance procedure under this Agreement. After the expiration of ninety (90) calendar days the employee shall be entitled to a place on the seniority list and his/her length of ser-vice for job security purposes shall date from the date of his/her employment, subject to other applicable provisions of this Agreement.

The probationary period may be extended by mutual agreement between the Employer and the Union.

ARTICLE XVI - MISCELLANEOUS PROVISIONS

SECTION 1

The Employer agrees that it will make out monthly reports known as "shop report" giving the names and amounts of

compensation each month for every employee working in its shop. This report shall be sent to the office of the Union monthly.

SECTION 2

Wages shall be paid weekly and shall be paid in full on regular pay day. The regular pay week shall be from Sunday, 12:00 midnight through Sunday, 12:00 midnight, inclusive.

Employees must report their full time and travel expenses by the end of the week previous to the regular pay day. They shall be paid no later than the end of the regular work day, the following Friday.

SECTION 3

Employees must be on the job ready to work at starting time and remain at work until quitting time; except that an installer reporting to a job outside the fifty (50) mile radius of the central station shall not be required to leave home more than one (1) hour before starting time or arrive home more than one (1) hour after quitting time, unless he/she is compensated for such time in excess of one (1) hour.

SECTION 4

The Union agrees that during the life of this Agreement it will not request nor demand any additional, new or different items pertaining to wages, hours, or conditions of employment, whether or not generally or specifically covered in this Agreement or discussed in negotiations leading thereto.

SECTION 5

The Employer and the Union recognize their obligation not to discriminate against any employee or any applicant for employment because of race, color, religion, age, sex, handicap, Veteran status, or national origin. In accordance with all applicable Federal, State and Local Legislation, this obligation not to

discriminate in employment includes, but is not limited to the following: hiring, placement, upgrading, transfer or demotion, recruitment advertising or solicitation for employment, training during employment, rates of pay or other forms of compensation, selection for training including apprenticeship, layoff or termination and social activities.

ARTICLE XVII - SEVERABILITY

It is understood by and between the parties hereto that the provisions of this Agreement are severable, and that if any law now existing or hereafter enacted, or any proclamation, regulation or edict of any state or national agency shall invalidate any portion of this Agreement, the entire agreement shall not be invalidated.

ARTICLE XVIII - SECURITY CLEARANCE

Because of the nature of the Employer's business, the parties agree that the discharge of any employee who cannot pass a governmental security clearance or who is refused coverage by any bonding Company shall not be subject to any recourse by the Union nor the employee involved.

ARTICLE XIX - JURY DUTY AND BURIAL CLAUSE

SECTION 1

When employees covered by this Agreement are called upon for petit Jury service, they shall advise their supervisor upon receipt of such call, but in any event not later than five (5) days before service, and if taken from their work for such service shall be recompensed for any loss of income, for a period not to exceed ten (10) days per year, by the payment of the difference between their fee for such service and their regular straight time pay. Employees shall present proof of service and the amount of juror's fees received. Employees called for jury duty at 10:00 a.m. or later shall report for work in the morning, if their regular

hours are at such time, and shall work until their court attendance is required, and shall return to work each day immediately upon being released by the court if such be within their regular working hours. Employees whose regular hours are different from the hours required of jurors shall, if they are required to serve more than four (4) hours on any one day, not be required to report for work on such day.

SECTION 2

When necessary, and upon request, in case of death of father, mother, husband, wife, brother, sister, son, daughter, mother-in-law or father-in-law the Employer will grant leave of absence with pay from day of death until and including day of funeral, not to exceed three (3) working days. The Employer may require both proof of death and attendance at the funeral before such pay is forthcoming.

In the event of the death of an employee's grandparent, such employee shall be granted one (1) day's leave of absence with pay for purposes of attending the funeral, subject to the same proof identified previously in this Section.

ARTICLE XX - PENSION

SECTION 1

A. The Baker Industries Incorporated Retirement Plan for Hourly employees has been extended to the St. Louis Branch union employees effective February 1, 1982. The Plan provides past appropriate service credit back to February 1, 1982, the date Baker Industries acquired the St. Louis Branch.

B. The pension benefit formula is currently $8.39/month x number years of credited service. The Company agrees to grant any benefit increases to this plan that take place during the life of this Labor Agreement.

C. Details of the plan and the provisions thereunder are available from the Employer upon request.

ARTICLE XXI - DRUG-FREE WORKPLACE

Section 1

The Parties agree to adopt the requirements of "The Drug-Free Workplace Act of 1988" and the "Department of Defense Drug-Free Workforce" rules for all bargaining unit employees.

Section 2

Any issues which arise under this article and which cannot be agreed to by the Parties will be submitted to an Arbitrator for resolution. The Parties will use the procedure in the Labor Agreement for selecting an Arbitrator. The Company will indemnify the Union and hold it harmless against any and all suits, claims, demands and liabilities that shall arise out of or by reason of any action that shall be taken by the Company for the purposes of complying with the foregoing provisions of this Article.

ARTICLE XXII - DURATION OF AGREEMENT

This Agreement shall he effective the 27th day of October, 1990, and shall continue in effect until midnight, October 26, 1993, and thereafter shall automatically renew itself from year to year.

However, either party may modify or terminate the Agreement on October 27, 1993, or any anniversary date thereafter, if the Agreement has then been automatically renewed in accordance with the provisions of this article, by giving the other party written notice of its desire to modify or terminate at least sixty (60) days prior to the desired date.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and signed by its authorized officers to be effective on the date stated in the Agreement.

For the Union:
Local #1 IBEW

For the Employer:
St. Louis, MO Office
Wells Fargo Alarm Services,
A Division of Baker Protective
Services Inc

_____ _____

_____ _____

_____ _____

_____ _____

EXHIBIT A

HOURLY WAGE PROGRESSION SCHEDULE

	Current	10/27/90	10/27/91	10/27/92
Trainees and Fire				
Step 1 (Start)	6.00	7.50	7.75	8.00
Step 2 (Probationary Rate)	6.50	8.00	8.25	8.50
Step 3	7.00	8.50	8.75	9.00
Step 4	8.96	9.23	9.51	9.80
Step 5	9.63	9.92	10.22	10.53
Installers and Service Technicians				
Step 1	10.22	10.53	10.85	11.18
Step 2	10.87	11.20	11.54	11.89
Step 3	11.48	11.82	12.17	12.54
Step 4	12.14	12.50	12.88	13.67
Step 5	12.77	13.15	13.54	13.95
System Technicians	13.41	13.81	14.22	14.65

EXHIBIT B

HOURLY WAGE PROGRESSION SCHEDULE

	Current	10/27/90	10/27/91	10/27/92
Operators				
Step 1 (Start)	5.00	5.25	5.50	5.67
Step 2 (Probationary Rate)	5.50	5.75	6.00	6.18
Step 3	6.00	6.25	6.50	6.70
Step 4	6.55	6.75	6.95	7.16
Step 5	6.83	7.03	7.24	7.46
Step 6	7.14	7.35	7.57	7.80
Step 7	7.44	7.66	7.89	8.13
Step 8	7.89	8.13	8.37	8.62
Step 9	8.64	8.90	9.17	9.45
Step 10	9.63	9.92	10.22	10.56
Asst. Lead Operator	9.92	10.22	10.53	10.84
Lead Operator	10.27	10.58	10.90	11.23

Installation Trainee Criteria

Field Service Dept.

Exhibit A-1

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale installation trainee is able to:	Employee Meets Criteria Yes	Employee Meets Criteria No	Appraisal Method
• Mount any commonly-used control/transmission/sounding equipment on any standard surface (wood, cinderblock, drywall, brick etc.) using the appropriate hardware and techniques.			
• Interconnect standard controls with standard low voltage bells/sounders to include making the proper connections for both the bell and tamper circuits.			
• Apply power to commonly-used electronic control, transmission, and detection equipment from low voltage power sources such as transformers and power supplies. This includes selecting the appropriate power source and making the connections safely and without damage to the equipment.			
• Run wire throughout a building using any of the standard methods (using wire tacks or staples, fishing through walls, using drive rings, or beam clamps, etc.)			

Installation Trainee Criteria (contd.)

Field Service Dept. Exhibit A-1

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale installation trainee is able to:	Employee Meets Criteria Yes	Employee Meets Criteria No	Appraisal Method
• Foil glazed surfaces, using the foil pattern appropriate for the type of glazing material present (glass, wire-mesh glass, Lexan, etc.), the type of opening (door, window) and any technical requirements (UL). This includes installing the appropriate connectors (foil blocks, door cords, etc.) and connecting the foil into the system wiring.			
• Mount any commonly-used detection device (door contract, floor switch, photo-electric, ultrasonic unit, infrared unit, shock sensor, etc.) securely and in the appropriate location for the device.			
• Connect individual detection devices to the system, observing color code, polarity, and the overall layout of the system.			
• Adjust/align commonly-used electronic detection equipment (ultrasonic, photo-electrics, capacitance systems, etc.)			

Installation Trainee Criteria (contd.)

Field Service Dept. Exhibit A-1

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale installation trainee is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Solder and tape wire-to-wire connections, so that these connections are electrically and mechanically sound.			
• Make wire-to-screw terminal connections that are electrically and mechanically sound.			
• Test a [illegible] of wires, using a multimeter, for the presence of AC voltage, DC voltage and resistance.			
• Use hand tools and ladders required for job, safely and appropriately.			
• Perform all of the above duties correctly, in an appropriate amount of time.			

Installation Technician Criteria

Field Service Dept.

Exhibit A-2

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale installation technician is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Perform all of the duties of an installation trainee, plus: • Assisted as necessary by supervisor, interprets sales paper work and determine the most efficient method to install the system, to include the location of equipment, the serviceability of the completed system etc. • Install any system sold by the branch coming under the description of Service and Installation. This employee should have no technical limitations within the scope of the business. • Direct and delegate to installation trainees, so as to take maximum advantage of each trainee's skills and abilities for overall job efficiency. Assist in the training and evaluation of installation trainees.			

Installation Technician Criteria (contd.)

Field Service Dept.

Exhibit A-2

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale installation technician is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Inspect the work of installation trainee with enough frequency to insure the quality of work being performed.			
• Interconnect the devices and wiring installed, with each other and the control equipment, so that the system and each device operates as planned.			
• Recognize and avoid environmental hazards that will interfere with the proper operation of the equipment.			
• Recognize and report deficiencies/discrepancies in systems "as sold". This includes systems that will not conform to UL requirements (if applicable), systems that cannot be taken over "as is" due to poor condition, obviously overlook points of vulnerability within a building.			

Installation Technician Criteria (contd.)

Field Service Dept.

Exhibit A-2

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale installation technician is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Connect and test the system's phone line (if any), and make any necessary equipment adjustments to insure clear signals from the system.			
• Test any commonly-used equipment to insure that the equipment if operating properly and to determine whether or not the equipment itself is defective.			
• Test and troubleshoot each system as a whole to insure proper operation and to locate actual or potential problem areas.			
• Document each installation using wire tags, system diagrams, etc., so that a service technician with adequate skills will be able to troubleshoot the system without difficulty.			
• Instruct the customer in the proper operation of the system.			

Installation Technician Criteria (contd.)

Field Service Dept. Exhibit A-2

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale installation technician is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Oversee and complete each assigned installation in the allotted time, with the exception of those installations in which there are unforeseen difficulties.			

Service Trainee Criteria

Field Service Dept.

Exhibit A-3

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale service trainee is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Test any commonly-used control, transmission, or detection equipment for proper operation, and determine whether or not the equipment itself is defective.			
• Adjust/align commonly-used detection equipment (ultrasonic, photoelectrics, capacitance units, etc.)			
• Test a phone line connection to determine whether if a phone line problem is our responsibility or the phone company's responsibility; repair/adjust equipment that is company's responsibility.			
• Operate a multimeter to read AC voltage, DC voltage, and resistance.			
• Respond, with the aid of a map, to any customer location within the branch's service area from either the Central Station or another customer location, in a reasonable time, without getting lost.			

Service Trainee Criteria (contd.)

Field Service Dept. Exhibit A-3

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale service trainee is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Recognize visible malfunctioning or damaged alarm equipment.			
• Test electronic equipment for the presence of the proper input power from the associated transformer or power supply.			
• Recognize environmental problems which will interfere with the proper operation of all or part of the system.			
• Foil doors and windows using the correct foil pattern; patch broken foil.			
• Solder and tape wire-to-wire connections; make proper wire-to-terminal connections.			
• Replace any commonly-used alarm equipment on a one-for-one basis.			

Service Trainee Criteria (contd.)

Field Service Dept. Exhibit A-3

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale service trainee is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
• Recognize and correct common system problems (poor splices, deteriorated foil/screens/panels, improperly mounted or loose detection equipment) that will cause false alarms or system instability.			
• Respond to an alarm and determine if the alarm is false or otherwise, and correct the cause of false alarms if the problem is visible.			
• Use hand tools associated with the job appropriately and safely.			
• Troubleshoot and repair a hold-up or burglary system, under "closed conditions, when the system included zoning, identification tags, or other wiring information, or if the system wiring is visible or otherwise easily followed.			
• Perform all of the above correctly, in a reasonable amount of time, given the prevailing conditions.			

Service Technician Criteria

Field Service Dept. Exhibit A-4

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale service technician is able to:	Employee Meets Criteria Yes	No	Appraisal Method
• Perform all of the duties of a service trainee plus: • Replace defective equipment with equipment of a similar type, but not necessarily of the same manufacturer or model. • Troubleshoot and repair any inoperative system, i.e. burglary, hold-up, fire supervised, etc. under "open" or "closed" conditions, whether or not wiring tags, diagrams, zoning, etc. are available. • Perform minor installation work (e.g. add protection to existing system, re-install portion of system following customer remodeling). • Recognize and report systems that are beyond repair through routing maintenance.			

Service Technician Criteria (contd.)

Field Service Dept. Exhibit A-4

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scale service technician is able to:	Employee Meets Criteria Yes	Employee Meets Criteria No	Appraisal Method
• Locate and repair cause of a false alarm from any burglary or hold-up system, whether or not the cause is visible.			
• Serve as a technical resource for less experienced service technicians, service trainees, etc.			
• Perform all of the above in reasonable amount of time, given the prevailing conditions.			
• Assist in training and evaluation of newly hired service trainees and/or less experienced service technicians as required by supervisor.			

Exhibit C

GRIEVANCE FORM

(Make This Form Out In Triplicate)

Distribution:

Original to Employer
Copy to Shop Steward
Copy to Business Representative

STEP 1

Before Filling Out This Form, Has An Attempt Been Made To Solve The Problem By Foreman & Employee?

If So, When?_____

Date_____

Time_____

Name of Employer_____Date _____

Name of Complainant_____Dept. _____

Shift_____Time_____

Address_____Phone _____

Foreman_____Shop Steward _____

Present Classification _____

Date of Employment _____

Grievance Facts in Detail & What Rights of Employee Were Violated

_____

_____

_____

_____

_____

Date of Occurrence_____Employee's Signature _____

Time of Occurrence_____

Steward's Comments (Attach Note if Necessary) _____

_____

_____

Steward's Signature_____Date Filled ___

Time Filled_____

STEP 2

Foreman's Decision _____

_____

_____

_____

Foreman's Signature_____

Date & Time of Action_____

Settlement Accepted: Yes_____ No_____

Signed_____Date _____
Employee

Signed_____Date _____
Steward

(If Grievance Is To Be Taken To Step 3, Reason Must Be Stated On Reverse Side And Signed By Employee And Steward.)

STEP 3

EMPLOYER REPRESENTATIVE-
BUSINESS REPRESENTATIVE

Disposition _____

_____

_____

_____

_____

_____

Business Representative _____
Signature Date/Time

Employer Representative _____
Signature Date/Time

CENTRAL STATION OPERATOR CRITERIA

Exhibit B-1

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scaleCentral Station operator is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
1. Identify, interpret, and correctly document any signal received at the Central Station.			
2. Dispatch the police to a burglar alarm and hold-up alarm.			
3. Dispatch the fire department to a fire alarm.			
4. Notify a customer about alarms and other events affecting his/her building or the systems we have installed.			
5. Explain to a customer the meaning of any alarm received from the customer's system(s).			

CENTRAL STATION OPERATOR CRITERIA (Contd.)

Exhibit B-1

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scaleCentral Station operator is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
6. Explain to a customer the procedure the Central Station will follow for any commonly experienced event or activity (alarm, late-to-close, use of keys, phone line problems, etc.), and the responsibilities that the customer has, in contrast with our responsibilities.			
7. Apply the branch standard for late closing customers with supervised systems, so that any customer who is within the operator's area of responsibility, and how fails to close, is identified and notified within the prescribed amount of time.			
8. Document fully any activity, using the forms provided, that the operator would normally handle. (Alarms, irregular openings/closings, trouble closing, service requests, etc.)			
9. Apply branch and UL standards to any customer opening signal received, and determine if the signal can be classified as either a legitimate opening or an alarm.			

CENTRAL STATION OPERATOR CRITERIA (Contd.)

Exhibit B-1

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scaleCentral Station operator is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
10. Carry out the Central station procedure, from start to finish, for reacting to each of the following: - a burglar alarm - a hold-up alarm - a fire alarm - a late closing - an improper closing - an unscheduled opening - any other situation requiring action by the Central Station.			
11. Maintain security over customer keys, using the procedure established by the branch.			
12. Explain to a customer the proper operation of commonly-used burglary controls.			
13. Explain to a customer the operation and function of commonly-used detection equipment, in layman's terms.			

CENTRAL STATION OPERATOR CRITERIA (Contd.)

Exhibit B-1

Given adequate training/documentation/exposure to the equipment and methods involved, a top-scaleCentral Station operator is able to:	Employee Meets Criteria		Appraisal Method
	Yes	No	
14. Carry out the branch procedure for receiving and documenting - a fire inspection - signals that are the result of customer work on a system. - a hold-up alarm test			
15. Receive customer complaint calls and either discuss the complaint with the customer, in a manner acceptable to both the company and the customer, or direct the caller to the appropriate person.			
16. Carry out those operator duties required by the specific branch, but not listed here.			

APPENDIX D

U.S. Code Ann. Titles 27-50 28 USCA Sec. 1254, Courts of appeals; certio... Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

----------Page 2270 follows----------

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 81—SUPREME COURT

Current through P.L. 103-219, approved 3-9-94

Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

U.S. Code Ann. Titles 27-50 28 USCA Sec. 1291, Final decisions of distric...Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

- - - - - - - - - - - - - - -Page 2401 follows- - - - - - - - - - - - - -

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 83—COURTS OF APPEALS

Current through P.L. 103-219, approved 3-9-94

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

U.S. Code Ann. Titles 27-50 28 USCA Sec. 1294, Circuits in which decision... Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

----------Page 3101 follows----------

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 83—COURTS OF APPEALS

Current through P.L. 103-219, approved 3-9-94

Sec. 1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

U.S. Code Ann. Titles 27-50 28 USCA Sec. 1332, Diversity of citizenship; ... Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works

---

----------Page 3437 follows----------

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

Current through P.L. 103-219, approved 3-9-94

Sec. 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the

case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

----------Page 3438 follows----------

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

U.S. Code Ann. Titles 27-50 41 USCA Sec. 701, Drug-free workplace require... Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

- - - - - - - - - - - - - - -Page 83604 follows- - - - - - - - - - - - - - -

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 10—DRUG FREE WORKPLACE

Current through P.L. 103-219, approved 3-9-94

Sec. 701. Drug-free workplace requirements for Federal contractors

(a) Drug-free workplace requirement

(1) Requirement for persons other than individuals

No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 403(8) of this title, for the purposes of being awarded a contract for the procurement of any property or services of a value of $25,000 or more from any Federal agency unless such person has certified to the contracting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the person's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the contracting agency within 10 days after receiving notice under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

----------Page 83605 follows----------

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

(2) Requirement for individuals

No Federal agency shall enter into a contract with an individual unless such contract includes a certification by the individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

(b) Suspension, termination, or debarment of the contractor

(1) Grounds for suspension, termination, or debarment

Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor thereunder or the individual who entered the contract with the Federal agency, as applicable, shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that—

(A) the contractor or individual has made a false certification under subsection (a) of this section;

(B) the contractor violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a)(1) of this section; or

(C) such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor has failed to make a good

faith effort to provide a drug-free workplace as required by subsection (a) of this section.

(2) Conduct of suspension, termination, and debarment proceedings

(A) If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, an appropriate action shall be initiated by a contracting officer of the agency, to be conducted by the agency concerned in accordance with the Federal Acquisition Regulation and applicable agency procedures.

(B) The Federal Acquisition Regulation shall be revised to include rules for conducting suspension and debarment proceedings under this subsection, including rules providing notice, opportunity to respond in writing or in person, and such other procedures as may be necessary to provide a full and fair proceeding to a contractor or individual in such proceeding.

----------Page 83606 follows----------

(3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any Federal agency, and for participation in any future procurement by any Federal agency, for a period specified in the decision, not to exceed 5 years.

U.S. Code Ann. Titles 27-50 41 USCA Sec. 702, Drug-free workplace require... Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

- - - - - - - - - - - - - - -Page 83608 follows- - - - - - - - - - - - - - -

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 10—DRUG FREE WORKPLACE

Current through P.L. 103-219, approved 3-9-94

Sec. 702. Drug-free workplace requirements for Federal grant recipients

(a) Drug-free workplace requirement

(1) Persons other than individuals

No person, other than an individual, shall receive a grant from any Federal agency unless such person has certified to the granting agency that it will provide a drug-free workplace by—

(A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(B) establishing a drug-free awareness program to inform employees about—

(i) the dangers of drug abuse in the workplace;

(ii) the grantee's policy of maintaining a drug-free workplace;

(iii) any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) the penalties that may be imposed upon employees for drug abuse violations;

(C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);

(D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment in such grant, the employee will—

(i) abide by the terms of the statement; and

(ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

(E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;

(F) imposing a sanction on, or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, as required by section 703 of this title; and

(G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

- - - - - - - - - - - - - - -Page 83609 follows- - - - - - - - - - - - - -

(2) Individuals

No Federal agency shall make a grant to any individual unless such individual certifies to the agency as a condition of such grant that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in conducting any activity with such grant.

(b) Suspension, termination, or debarment of the grantee

(1) Grounds for suspension, termination, or debarment

Each grant awarded by a Federal agency shall be subject to suspension of payments under the grant or termination of the grant, or both, and the grantee thereunder shall be subject to suspension or debarment, in accordance with the requirements of this section if the agency head of the granting agency or his official designee determines, in writing, that—

(A) the grantee has made a false certification under subsection (a) of this section;

(B) the grantee violates such certification by failing to carry out the requirements of subparagraph (A), (B), (C), (D), (E), (F), or (G) of subsection (a)(1) of this section; or

(C) such a number of employees of such grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a)(1) of this section.

(2) Conduct of suspension, termination, and debarment proceedings

A suspension of payments, termination, or suspension or debarment proceeding subject to this subsection shall be conducted in accordance with applicable law, including Executive Order 12549 or any superseding Executive order and any regulations promulgated to implement such law or Executive order.

(3) Effect of debarment

Upon issuance of any final decision under this subsection requiring debarment of a grantee, such grantee shall be ineligible for award of any grant from any Federal agency and for participation in any future grant from any Federal agency for a period specified in the decision, not to exceed 5 years.

U.S. Code Ann. Titles 27-50 41 USCA Sec. 703, Employee sanctions and reme... Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

----------Page 83611 follows----------

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 10—DRUG FREE WORKPLACE

Current through P.L. 103-219, approved 3-9-94

Sec. 703. Employee sanctions and remedies

A grantee or contractor shall, within 30 days after receiving notice from an employee of a conviction pursuant to section 701(a)(1)(D)(ii) or 702(a)(1)(D)(ii) of this title—

(1) take appropriate personnel action against such employee up to and including termination; or

(2) require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

U.S. Code Ann. Titles 27-50 41 USCA Sec. 704, Waiver
Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

----------Page 83612 follows----------

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 10—DRUG FREE WORKPLACE

Current through P.L. 103-219, approved 3-9-94

Sec. 704. Waiver

(a) In general

A termination, suspension of payments, or suspension or debarment under this chapter may be waived by the head of an agency with respect to a particular contract or grant if—

(1) in the case of a waiver with respect to a contract, the head of the agency determines under section 701(b)(1) of this title, after the issuance of a final determination under such section, that suspension of payments, or termination of the contract, or suspension or debarment of the contractor, or refusal to permit a person to be treated as a responsible source for a contract, as the case may be, would severely disrupt the operation of such agency to the detriment of the Federal Government or the general public; or

(2) in the case of a waiver with respect to a grant, the head of the agency determines that suspension of payments, termination of the grant, or suspension or debarment of the grantee would not be in the public interest.

(b) Exclusive authority

The authority of the head of an agency under this section to waive a termination, suspension, or debarment shall not be delegated.

U.S. Code Ann. Titles 27-50 41 USCA Sec. 705, Regulations
Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

----------Page 83613 follows----------

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 10—DRUG FREE WORKPLACE

Current through P.L. 103-219, approved 3-9-94

Sec. 705. Regulations

Not later than 90 days after November 18, 1988, the governmentwide regulations governing actions under this chapter shall be issued pursuant to the Office of Federal Procurement Policy Act. (41 U.S.C. 401 et seq.).

U.S. Code Ann. Titles 27-50 41 USCA Sec. 706, Definitions
Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

- - - - - - - - - - - - - - -Page 83614 follows- - - - - - - - - - - - - -

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 10—DRUG FREE WORKPLACE

Current through P.L. 103-219, approved 3-9-94

Sec. 706. Definitions

For purposes of this chapter—

(1) the term "drug-free workplace" means a site for the performance of work done in connection with a specific grant or contract described in section 701 or 702 of this title of an entity at which employees of such entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this Act;

(2) the term "employee" means the employee of a grantee or contractor directly engaged in the performance of work pursuant to the provisions of the grant or contract described in section 701 or 702 of this title;

(3) the term "controlled substance" means a controlled substance in schedules I through V of section 812 of Title 21;

(4) the term "conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(5) the term "criminal drug statute" means a criminal statute involving manufacture, distribution, dispensation, use, or possession of any controlled substance;

(6) the term "grantee" means the department, division, or other unit of a person responsible for the performance under the grant;

(7) the term "contractor" means the department, division, or other unit of a person responsible for the performance under the contract; and

(8) the term "Federal agency" means an agency as that term is defined in section 552(f) of Title 5.

U.S. Code Ann. Titles 27-50 41 USCA Sec. 707, Construction of chapter Copyright (c) West Publishing Co. 1994 No claim to original U.S. Govt. works.

- - - - - - - - - - - - - - -Page 83616 follows- - - - - - - - - - - - - - -

UNITED STATES CODE ANNOTATED
TITLE 41. PUBLIC CONTRACTS
CHAPTER 10—DRUG FREE WORKPLACE

Current through P.L. 103-219, approved 3-9-94

Sec. 707. Construction of chapter

Nothing in this chapter shall be construed to require law enforcement agencies, if the head of the agency determines it would be inappropriate in connection with the agency's undercover operations, to comply with the provisions of this chapter.

Haw. Rev. Stat. Secs. 378-61 to 378-69

EMPLOYMENT PRACTICES

[PART V.] WHISTLEBLOWERS' PROTECTION ACT

Revision Note

In this part, "part" substituted for "chapter."

[§378-61] Definitions. As used in this part:

"Employee" means a person who performs a service for wages or other remuneration under a contract for hire, written or oral, express or implied. Employee includes a person employed by the State or a political subdivision of the State.

"Person" means an individual, sole proprietorship, partnership, corporation, association, or any other legal entity.

"Public body" means:

(1) A state officer, employee, agency, department, division, bureau, board, commission, committee, council, authority, or other body in the executive branch of state government.

(2) An agency, board, commission, committee, council, member, or employee of the legislative branch of the state government.

(3) A county, city, intercounty, intercity, or regional governing body, a council, special district, or municipal corporation, or a board, department, commission, committee, council, agency, or any member or employee thereof;

(4) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body;

(5) A law enforcement agency or any member or employee of a law enforcement agency; or

(6) The judiciary and any member or employee of the judiciary. [L 1987 c 267, pt of §1]

[§378-62] Discharge of, threats to, or discrimination against employee for reporting violations of law. An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

(1) The employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing, a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false; or

(2) An employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [L 1987, c 257, pt of §1]

[§378-63] Civil actions for injunctive relief or damages. (a) A person who alleges a violation of this part may bring a civil action for appropriate injunctive relief, or actual damages, or both within ninety days after the occurrence of the alleged violation of this part.

(b) An action commenced pursuant to subsection (a) may be brought in the circuit court for the circuit where the alleged violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business.

(c) As used in subsection (a), "damages" means damages for injury or loss caused by each violation of this part, including reasonable attorney fees. [L 1987, c 267, pt of §1]

[§378-64] Remedies ordered by court. A court, in rendering a judgment in an action brought pursuant to this part, shall order, as the court considers appropriate, reinstatement of the employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney's fees and witness fees, if the court determines that the award if appropriate. [L 1987, c 267, pt of §1]

[§378-65] Penalties for violations. (a) A person who violates this part shall be fined not more than $500 for each violation.

(b) A civil fine which is ordered pursuant to this part shall be deposited with the director of finance to the credit of the general fund of the State. [L 1987, c 267, pt of §1]

[§378-66] Collective bargaining and confidentiality rights, takes precedence. (a) This part shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement, nor to permit disclosures which would diminish or impair the rights of any person to the continued protection of confidentiality of communications where statute or common law provides such protection.

(b) Where a collective bargaining agreement provides an employee rights and remedies superior to the rights and remedies provided herein, contractual rights shall supersede and take precedence over the rights, remedies, and procedures provided in this part. Where a collective bargaining agreement provides inferior rights and remedies to those provided in this part, the provisions of this part shall superseded and take precedence over

the rights, remedies, and procedures provided in collective bargaining agreements. [L 1987, c 267, pt of §1]

[§378-67] Compensation for employee participation in investigation, hearing, or inquiry. This part shall not be construed to require an employer to compensate an employee for participation in an investigation, hearing, or inquiry held by a public body in accordance with section 378-62 of this part. [L 1987, c 267, pt of §1]

[§378-68] Notices of employee protections and obligations. An employer shall post notices and use other appropriate means to keep the employer's employees informed of their protections and obligations under this part. [L 1987, c 267, pt of §1]

Cross References

Employee protection, see §128D-15.

[§378-69] Conflict with common law, precedence. The rights created herein shall not be construed to limit the development of the common law nor to preempt the common law rights and remedies on the subject matter of discharges which are contrary to public policy. In the event of a conflict between the terms and provisions of this part and any other law on the subject the more beneficial provisions favoring the employee shall prevail. [L 1987, c 267, pt of §1]